

Classification to 81-64-I

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February 7, 1983

Pesticides Control Board  
85 Manchester Street  
Concord, New Hampshire 03301

c/o Mr. Murray L. McKay  
Pesticide Control Supervisor

Re: Section 2(ee) of FIFRA

Dear Members of the Board:

This letter is in response to your request for a written summary of my remarks made to the Board at its January 26, 1983 meeting concerning the above-referenced matter. As you may recall, at that meeting I briefly outlined the affect the adoption of a State regulation similar to Section 2(ee) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §136(ee), would have on present Board policy and rules regarding the regulation of pesticide use in New Hampshire. These remarks were in part based on information concerning Section 2(ee) discussed in my letter to Murray L. McKay, Pesticide Control Supervisor, dated May 26, 1982. In short, as mentioned in my earlier letter, adoption of a State regulation similar to Section 2(ee) would constitute a significant modification of the Board's existing rule Pes 502.01 governing pesticide use inconsistent with the manufacturer's label.

For purposes of federal law, Section 2(ee) defines what it means "to use any registered pesticide in a manner inconsistent with its labeling." That section provides, inter



alia, that the following uses are no longer considered uses inconsistent with the manufacturer's label:

1. Applying a pesticide at any dosage, concentration, or frequency less than that specified on the labeling;
2. Applying a pesticide against any target pest not specified on the labeling if the application is to the crop, animal, or site specified on the labeling;
3. Employing any method of application not prohibited by the labeling; and
4. Mixing a pesticide or pesticides with a fertilizer when such mixture is not prohibited by the labeling.

In other words, any pesticides used or applied as set forth above do not constitute a misuse, even though such uses may deviate from a literal reading of the manufacturer's label. Furthermore, while it is a violation of federal law under Section 12(a)(1)(B) of FIFRA for a seller or distributor to make any claim regarding the use of pesticides not listed on the label, it is EPA's present policy to allow even "financially interested" persons to recommend uses which deviate from the manufacturer's label provided that such uses fall within the scope of Section 2(ee). EPA Enforcement Policy Statement (PEPs) dated July 7, 1981. EPA reasons that since Section 2(ee) uses no longer constitute a misuse of pesticides and, thus, are not unlawful, the question of who can recommend a particular use becomes irrelevant. Id. In sum, under present federal law and EPA interpretations thereof, any pesticide use in accordance with Section 2(ee) is not a misuse and essentially anyone can recommend such a use.

The existing regulations of the Pesticide Control Board, however, stand in stark contrast to the above-described federal law and agency interpretation. The regulations of the Board permit deviation from the manufacturer's label in only very limited circumstances. Pes 502.01. Deviation from the manufacturer's label is allowed only if the deviation is recommended by a "legally constituted authority," Pes 502.01, and then only if the recommendation is for a pesticide use

presently allowed under Section 2(ee) of FIFRA, Pes 101.17. Thus, under New Hampshire law it is important from an enforcement standpoint to know not only how a pesticide was actually used, but also, where the use deviates from the manufacturer's label, who, if anyone, recommended such a use.

As I pointed out at the Board's January 26, 1983 meeting, whether the Board should "liberalize" its existing rules and adopt a State regulation similar to Section 2(ee) is a matter of policy for the Board to decide. Without question, the Board has broad authority to regulate the use of pesticides in New Hampshire, RSA 149-D:7 V, and may adopt a rule similar to Section 2(ee) if it determines that such a rule is in the best interest of the people of New Hampshire. Please note that this office takes no position on that issue.

Depending upon whether or not the Board decides to adopt a State rule similar to Section 2(ee), it may have a second policy decision to make. This second policy decision concerns whether the Board should require that recommendations from "legally constituted authorities" be in writing. If the Board adopts a rule similar to Section 2(ee), the pesticide uses described therein would no longer be considered misuses and, therefore, would not constitute a violation of the Board's rule prohibiting pesticide uses inconsistent with the manufacturer's label. As with federal law, if such uses are no longer violations, it is unnecessary for enforcement purposes to know who recommended such uses. In that situation the entire issue of written versus oral recommendations now being considered by the Board is rendered moot. On the other hand, if the Board continues to follow its present policy of allowing Section 2(ee) uses only when recommended by a "legally constituted authority," then the Board should determine if the applicator who intends to deviate from the manufacturer's label should obtain a written recommendation.

It should be made clear that the Board is not required by law to require written recommendations. However, the Pesticides Control Division has recommended to the Board that if the Board continues to follow its present policy of allowing "legally constituted authorities" to make recommendations which deviate from the manufacturer's label, the Board should require such recommendations to be in writing. This office concurs with the recommendation of the Division in that the requirement of a written recommendation will reduce the administrative and investigative burden of the State by providing for a quick and

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indisputable method of determining whether the applicator has complied with Board regulations. Nevertheless, the final decision rests with the Board to decide as a matter of policy if the advantages gained from such a rule outweigh whatever burdens may be placed the "legally constituted authorities" to produce written recommendations.

To summarize, the Board should first decide if it wishes to adopt a rule similar to Section 2(ee). If the Board decides to adopt such a rule, then the question of who can make Section 2(ee) recommendations deviating from the manufacturer's label and what form those recommendations should take is moot. If, however, the Board decides to retain its present rule prohibiting deviations from the manufacturer's label except upon recommendation by a "legally constituted authority," then it should decide as a matter of policy if such recommendations should be in writing and modify its rules accordingly.

If I can be of further assistance with regard to this matter, please let me know.

Very truly yours,

*Robert P. Cheney Jr.*  
Robert P. Cheney Jr.  
Attorney  
Environmental Protection Division

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RPC,Jr./lw